

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|------------------------|---|----------------------|
| JERRY PAGE |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| ENSMINGER GRAIN |) | |
| Respondent |) | Docket No. 1,035,466 |
| |) | |
| AND |) | |
| |) | |
| UNKNOWN |) | |
| Insurance Carrier |) | |

ORDER

Respondent requests review of the March 6, 2009 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found that the respondent met the wage requirement of \$20,000 in the years of 2006 and 2007 and therefore is subject to the Workers Compensation Act.¹

The respondent requests review of whether the ALJ erred in finding that respondent's payroll was sufficient to invoke the obligations under the Workers Compensation Act (Act).² Respondent argues that the evidence does not support the ALJ's decision. Specifically, that only certain individual's wages should have been considered part of respondent's payroll and that as of April 2007, respondent reasonably

¹ The ALJ's Order made a factual finding with respect to coverage under the Act but failed to order the payment of benefits.

² K.S.A. 44-505(a)(2).

expected to lessen its payroll to a sum less than \$20,000. Thus, respondent maintains the ALJ's Order should be reversed as the Act does not apply.

Respondent and claimant also noted that the ALJ failed to address the remaining issue remanded to him by the Board in the initial appeal, that of the appropriate identity of the respondent(s). Both parties agree that the respondent is David and Alden Ensminger doing business as Ensminger Grain, a partnership, but the caption fails to account for this fact.

Claimant argues that the ALJ should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

This is the second appearance for this claim before the Board. After the first preliminary hearing, the ALJ concluded the nature of claimant's employment did not invoke the provisions of the Act because respondent's business was agricultural in nature. That decision was reversed on appeal by one member of the Board.³ The case was then remanded to the ALJ for further proceedings as he made no findings with respect to the other statutory prerequisites to coverage. Specifically, the ALJ did not make any findings as to respondent's payroll.

Following that remand, further evidence was offered. The ALJ considered the evidence offered by the parties and concluded that respondent's payroll "clearly met the wage requirement of \$20,000 in the years of 2006 and 2007".⁴ He further found that "[t]he testimony of the Ensminger brothers, while contrary, is not credible."⁵

This presentation involves but a single issue: whether respondent's payroll exceeds the statutory threshold in 2006 and whether it reasonably expected to breach that amount in 2007. If the answer to that question is "yes", then the Act applies and claimant is entitled to benefits. Conversely, if the answer is "no", then the Act does not apply and claimant is not entitled to coverage under the Act.⁶

³ Board Order, 2008 WL 3280311 (July 31, 2008).

⁴ ALJ Order (Mar. 6, 2009).

⁵ *Id.*

⁶ And if that is the case, then claimant has to the right to pursue respondent under a negligence theory.

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends.⁷ Claimant's burden to prove coverage under the Act, also includes whether respondent has the requisite payroll requirements as set forth in K.S.A. 44-505(a).⁸ The pertinent provisions of K.S.A. 44-505(a) provide as follows:

... the workers compensation act shall apply to all employments wherein employers employ employees within this state except . . .

(2) any employment, . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, . . . ;

The record in this matter is lengthy and based upon the parties' briefs to the Board, the evidence contained in the record is well known to the parties. Given this familiarity there is no need to regurgitate summaries of each witnesses' testimony in this Order. Suffice it to say, the two Ensminger brothers, who collectively own and operate a business known as Ensminger Grain, would have this court believe that they own in excess of 2,000 acres, as well as a defunct and non-operational seed company. They contend that they spent far less than \$20,000 in payroll in the years 2006 and 2007 in spite of the number of individuals who have or continue to work there on a regular basis. They allow a woman, Jeannie Myers, to come into an office each day so that she can make phone calls and in general conduct her own personal business, stopping every so often to weigh seed for an occasional farmer who happens by and to run errands for the Ensminger brothers. According to this woman, she receives a sporadic \$50 bill and some hay for her time. She categorically denies that she is employed on a full-time basis although other witnesses say she is.⁹ Rather, she categorizes her time at the seed plant as something more of a social outlet.

Beyond that, David Ensminger testified that his payroll was limited to part-time labor, both on his farm and at the seed facility. He emphatically denies that his payroll exceeded the \$20,000 threshold in either 2006 or 2007. In fact, to the extent any of the witnesses testified differently to their pay amounts, the extent of their employment or the activities going on at the seed plant, David Ensminger would label them a "liar". Yet, every time

⁷ *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

⁸ *Brooks v. Lochner Builders, Inc.*, 5 Kan. App.2d 152, 613 P.2d 389 (1980).

⁹ At one point during a deposition, a phone call was placed to Ensminger Grain and Ms. Myers answered the phone.

claimant's counsel attempted a closer examination of that fact David Ensminger would plead ignorance and defer to his brother, Alden Ensminger.

The ALJ specifically noted - and this Board Member agrees - that neither of the Ensminger brothers' testimony was credible. Likewise, this Board member finds Ms. Myers equally lacks credibility. Having made those conclusions, this Board Member finds the ALJ's conclusions relative to the respondent's payroll should be affirmed.

David Fry testified that he earned \$7.50 per hour working 40 hours per week. John Page, claimant's brother, continues to work for respondent and testified that in 2007 he was earning \$10 per hour on a full-time basis. Claimant testified that he was working full-time at \$6.00 per hour. Jeannie Myers continues to work for respondent and although this member of the Board places no credibility on the bulk of her testimony, at a minimum she was paid \$800 in 2006 and \$600 in 2007. Moreover, Ms. Myers testified about other individuals who were employed at various times during 2006 and 2007 and were paid with cash or by check. When these figures are annualized and totaled, the ALJ concluded that the \$20,000 threshold was met. This Board Member agrees.

Although respondent's records are not consistent with each of these figures, this Board Member finds David Fry, Roger and Jerry Page to be far more credible than the Ensminger brothers or Ms. Myers. Thus, their testimony is accepted. It would appear, even to the casual observer, that Ensminger Grain is engaged in a shell game designed to avoid the implications of the Act.

Therefore, the ALJ's Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹⁰ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated March 6, 2009, is affirmed.

¹⁰ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Patrick S. Smith, Attorney for Claimant
Zackery E. Reynolds, Attorney for Respondent
Thomas Klein, Administrative Law Judge